

**State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

CITY OF WENATCHEE,

Petitioner(s),

v.

CHELAN COUNTY,

Respondent,

BRIAN NELSON,

Intervenor.

Case No. 08-1-0015

**COMPLIANCE ORDER**

On March 6, 2009, the Eastern Washington Growth Management Hearings Board (Board) issued its Final Decision and Order (FDO) in the above captioned matter. With this FDO, the Board concluded Chelan County had failed to comply with the Growth Management ACT (GMA) when it enacted six comprehensive plan amendments.

The Board set a deadline of July 6, 2009 for Chelan County to take legislative action to bring itself into compliance with the GMA as provided in the Board's FDO. Between May and July 2009, the County took five legislative actions which it contends brought it into compliance with the Board's March 2009 FDO.

With this Compliance Order, the Board finds Chelan County has taken the necessary legislative actions to bring itself into compliance with the GMA, as set forth in the Board's March 2009 FDO, and issues a Finding on Compliance.

## I. RELEVANT PROCEDURAL HISTORY

On March 6, 2009, the Board issued its FDO. This matter related to the City of Wenatchee's challenge to six comprehensive plan amendments (CPAs) adopted by Chelan County during the 2008 amendment cycle. These CPAs changed the land use designation/zoning on land located within the unincorporated areas of Chelan County and outside of the existing Wenatchee Urban Growth Area. Wenatchee contended, among other things, the challenged CPAs allowed for an increase in density in violation of several provisions of the GMA. The Board partially agreed with Wenatchee's assertions, specifically finding violations of RCW 36.70A.110 and RCW 36.70A.130(2) and GMA goals RCW 36.70A.020(1), .020(2), .020(3), and .020(12).<sup>1</sup>

Between May and July 2009, the County took five legislative actions in response to the Board's FDO: Resolutions Nos. 2009-61, 2009-68, 2009-69, 2009-70, and 2009-71.<sup>2</sup>

During July and August 2009, the Board received timely filings of the following: Chelan County's Statement of Actions Taken to Comply (SATC),<sup>3</sup> City of Wenatchee's Compliance Brief,<sup>4</sup> Intervenor Brian Nelson's Compliance Brief,<sup>5</sup> Chelan County's Compliance Brief,<sup>6</sup> and City of Wenatchee's Compliance Reply Brief.<sup>7</sup>

On September 1, 2009, the Board held a telephonic compliance hearing in this matter. Board members Joyce Mulliken, John Roskelley, and Ray Paoella were present with Board member Mulliken presiding. Chelan County was represented by Susan Hinkle; the City of Wenatchee by Steve Smith; Intervenor by Don Dimmitt.

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<sup>1</sup> March 2009 FDO, at 40-45 Findings and Conclusions.

<sup>2</sup> County's SATC, Exhibits 1, 4, 5, 6, and 7.

<sup>3</sup> Filed July 14, 2009.

<sup>4</sup> Filed July 27, 2009.

<sup>5</sup> Filed July 31, 2009.

<sup>6</sup> Filed August 10, 2009.

<sup>7</sup> Filed August 17, 2009.

## II. DISCUSSION and ANALYSIS

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to enact legislation to achieve compliance.<sup>8</sup> In compliance proceedings such as these, the presumption of validity applies and the burden remains with the City of Wenatchee to establish that the new adoption is clearly erroneous.<sup>9</sup>

With the Board's March 2009 FDO, the Board found Chelan County had failed to comply with the GMA in the following regards:<sup>10</sup>

Finding and Conclusion No. 17: The City of Wenatchee has carried its burden of proof in demonstrating that the County's action in approving two of the challenged Comprehensive Plan Amendments – CPA 2007-011 and 2007-012 – permits urban growth within the rural areas of Chelan County in violation of RCW 36.70A.110, given the definition of urban growth set forth in RCW 36.70A.030(18).

Finding and Conclusion No. 21: The City of Wenatchee, because it demonstrated that the County is permitting urban growth outside of a designated Urban Growth Area, carried its burden of proof in demonstrating that the County's GMA planning decisions were not guided by the goals of the GMA as set forth in RCW 36.70A.020(1), .020(2), .020(3), and .020(12).

Order No. 1: Chelan County's action in enacting Resolution 2008-106, approving Comprehensive Plan Amendment CPA 2007-011, and Resolution 2008-012, approving Comprehensive Plan Amendment CPA 2007-012, violates RCW 36.70A.110 and was not guided by RCW 36.70A.020(1), .020(2), .020(3), and .020(12).

Finding and Conclusion No. 29: The City of Wenatchee has carried its burden of proof in demonstrating that the County's action in approving the challenged Comprehensive Plan Amendments on July 22, 2008, which effectively amended the County's Comprehensive Plan more than once in a given year in violation of RCW 36.70A.130(2).

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<sup>8</sup> RCW 36.70A.300(3)(b).

<sup>9</sup> RCW 36.70A.320(1),(2) and (3). The burden of proof only shifts to Chelan County if the Board previously issued a Determination of Invalidity. No such determination was made in this matter.

<sup>10</sup> March 2009 FDO at 43-45.

Order No. 2: Chelan County's action in enacting Resolutions 2008-106, 2008-107, 2008-111, 2008-112, and 2008-113, respectively approving Comprehensive Plan Amendments CPA 2007-011, 2007-012, 2007-017, 2007-018, 2007-019, and 2007-021, violates RCW 36.70A.130(2).

Between May and July 2009, the County took five legislative actions which it contends achieves compliance: Resolutions Nos. 2009-61, 2009-68, 2009-69, 2009-70, and 2009-71.<sup>11</sup> The Resolutions result in the following actions:

Resolution Number	Date Adopted	Action
No. 2009-61	May 26, 2009	Rescinds Resolution Nos. 2008-106 (CPA 2007-011) and 2008-107 (CPA 2007-012)
No. 2009-68	July 7, 2009	Amends Resolution No. 2008-113 (CPA 2007-021) reaffirms CPA 2007-021 and provides supplemented Findings of Fact and Conclusions of Law
No. 2009-69	July 7, 2009	Amends Resolution No. 2008-112 (CPA 2007-019) reaffirms CPA 2007-019 and provides supplemented Findings of Fact and Conclusions of Law
No. 2009-70	July 7, 2009	Amends Resolution No. 2008-111 (CPA 2007-018) reaffirms CPA 2007-018 and provides supplemented Findings of Fact and Conclusions of Law
No. 2009-71	June 30, 2009	Amends Resolution No. 2008-110 (CPA 2007-017) reaffirms CPA 2007-017 and provides supplemented Findings of Fact and Conclusions of Law

Petitioners agree that by rescinding the two resolutions which approved CPA Nos. 2007-011 and 2007-012, the County has complied with the Board's FDO.<sup>12</sup> The Board

<sup>11</sup> County's SATC.

1 concurs; by repealing two of the challenged resolutions, which result in the withdrawal of  
2 CPA 2007-011 and CPA 2007-012, the County has removed the basis for non-compliance in  
3 regards to Issues 2, 3, and 4. For the remaining Resolutions and their related CPAs, the  
4 County selected not to rescind the challenged legislation but rather to adopt supplemental  
5 findings and conclusions to demonstrate cumulative effects had been considered.<sup>13,14</sup>

6 Wenatchee contends Chelan County has failed to achieve compliance because the  
7 "re-adoption of resolutions whose original adoption violated the GMA does not resolve the  
8 initial violation," thereby not satisfying the provisions of RCW 36.70A.130(2)(b).<sup>15</sup> In  
9 addition, Wenatchee asserts the County still fails to consider the cumulative impacts of all  
10 2008 amendments.<sup>16</sup> Wenatchee further notes the Board of County Commissioners (BOCC)  
11 held a single closed record hearing, thereby disallowing public comment or input in relation  
12 to the supplemental findings and conclusions.<sup>17</sup> Lastly, Wenatchee argues the  
13 supplemental findings and conclusions are conclusory in nature and not supported by the  
14 Record.<sup>18</sup>

15 In response to these assertions, both the County and the Intervenor remind the  
16 Board that only six of the County's 30 CPAs adopted in 2008 were appealed by Wenatchee  
17 and, thus, it was not required to revisit the un-appealed CPAs.<sup>19</sup> Chelan County points out

18 <sup>12</sup> Wenatchee Compliance Brief, at 2.

19 <sup>13</sup> In both their briefing and at oral argument, Wenatchee contends that rescission was the only option  
20 available to Chelan County for all of the challenged CPAs. Although this was indeed an option available to the  
21 County, and one they selected for some of the challenged CPAs, neither the Board or the GMA directs Chelan  
22 County to take such an action – how the County responds to a Board's finding of non-compliance is at the  
23 discretion of the County. *See e.g. McHugh v. Spokane*, EWGMHB Case No. 05-1-0004, Compliance Order at 5  
24 (March 5, 2007) (Holding that the Board does not have authority to order the County to take any particular  
25 actions to bring itself into compliance. The task of a GMHB is to determine compliance with the GMA, not  
26 whether there could be better solutions determined by a local government.)

<sup>14</sup> The rationale behind these supplemental findings/conclusions is that the Board, in its FDO, noted that not  
only does the GMA limit comprehensive plan amendments to once per year but it also requires concurrent  
review of proposed amendments to ascertain the cumulative effects of the proposals.

<sup>15</sup> Wenatchee Compliance Brief, at 4.

<sup>16</sup> Wenatchee Compliance Brief, at 4.

<sup>17</sup> Wenatchee Compliance Brief, at 3-4

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> County Compliance Brief, at 3; Intervenor's Compliance Brief at 4-5.

1 with its supplemental findings it has documented the cumulative effects and is joined by the  
2 Intervenor in contending Wenatchee is simply asserting late allegations of other GMA  
3 violations.<sup>20</sup>

- 4 • **RCW 36.70A.130(2)(b)**

5 As for Wenatchee's contention that 130(2)(b)'s exemption is not applicable to this  
6 situation, RCW 36.70A.130(2)(b) specifically provides: (Emphasis added)

7 Except as otherwise provided in (a) of this subsection, all proposals shall be  
8 considered by the governing body concurrently so the cumulative effect of the  
9 various proposals can be ascertained. However, after appropriate public  
10 participation *a county or city may adopt amendments or revisions to its  
comprehensive plan that conforms with this chapter* whenever an emergency  
exists or *to resolve an appeal of a comprehensive plan filed with a growth  
management hearings board, or with the court.*

11 According to Wenatchee, since the original adoption of the resolutions violated the GMA's  
12 limitation on annual amendments, both in regards to the limitation and to concurrent,  
13 cumulative review, their re-adoption does not "resolve the initial violation."<sup>21</sup> While it is  
14 true the Board found Chelan County had violated RCW 36.70A.130(2)'s limitation, the GMA  
15 provides for several exceptions to this amendment limitation - one of which specifically  
16 provides for an exception in order to resolve an appeal before the Board.<sup>22,23</sup> As the parties  
17 are aware, the principal rule of statutory construction is that the Legislature's intent must  
18 be carried out and although this intent is determined primarily from the language of the  
19 statute itself, the Board must construe the statute so that all the language is given effect

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22 <sup>20</sup> County Compliance Brief, at 3-4; Intervenor's Compliance Brief, at 3-4.

<sup>21</sup> Wenatchee Compliance Brief, at 4.

<sup>22</sup> RCW 36.70A.130(2)(b).

23 <sup>23</sup> Although a violation of the GMA's annual limitation prohibition was presented to the Board, the crux of  
24 Wenatchee's case went to the effect of the challenged CPAs. See March 2009 FDO – Issue 1 (CPAs limit  
25 Wenatchee's ability to expand urban services); Issue 2 (CPAs violate goals related to sprawl, urban growth,  
environment, public services); Issue 3 (CPAs violate .110 language as to urban growth); Issue 4 (CPAs  
prevent UGA expansion and .110 locational criteria); Issue 5 (CPAs permit urban growth in agricultural lands).

1 and no portion is rendered meaningless or superfluous.<sup>24</sup> For the Board to read the  
2 provisions in .130 as suggested by Wenatchee would result in this section of the GMA being  
3 reduced to a meaningless provision when the underlying violation was related to .130's  
4 annual limitation.<sup>25</sup>

5 Therefore, the Board does not read .130(2)(b)'s as promoted by Wenatchee and  
6 concludes the adoption of Resolution Nos. 2009-068, 2009-069, 2009-070, and 2009-071  
7 comes under the exception of RCW 36.70A.130(2)(b) because Chelan County took these  
8 legislative actions in order to resolve the appeal and the GMA specifically provides for such  
9 an exception.<sup>26</sup> Whether or not the action selected by the County actually resolves the  
10 appeal is another question and is for the Board to decide.

11 • **Supplemental Findings and Conclusions**

12 As the Board noted in the March 2009 FDO, the primary reason for limiting amendments  
13 to no more than once a year is for the proposed amendments to be considered  
14 "concurrently so that the cumulative effects of the various proposal can be ascertained."<sup>27</sup>  
15 The Board set forth the rationale in the FDO in regard to concurrent review:<sup>28</sup> (Emphasis in  
16 original)

17 The problem is before the BOCC, the ultimate decision-maker even heard  
18 public testimony in relationship to CPA 2007-011, it had already enacted  
19 resolutions which adopted 16 other CPAs changing land use designations and  
20 four related to its cities' comprehensive plans. All of these previously adopted

21 <sup>24</sup> *Kilian v. Atkinson*, 147 Wn.2d 16, 20-21 (2002)

22 <sup>25</sup> The Board contrasts this holding with the one it made in the March 2009 FDO. In the FDO, the Board  
23 noted that Chelan County's re-adoption of the six challenged CPAs in July did not satisfy RCW  
24 36.70A.130(2)(b) because the new adoption did not resolve an appeal related to Case No. 08-1-0012. In  
25 addressing this, the Board noted the very same issues addressed in the first appeal, which was dismissed on  
26 July 17, 2008, were presented in the second appeal and the erroneous action taken by the County was done  
27 on July 22, 2008 – after the prior case was dismissed. Therefore, the re-adoption of the resolutions did not  
28 resolve the prior appeal because that appeal had already been dismissed and closed prior to the County taking  
29 action. Here, Case 08-1-0015 is still actively before the Board and the County has taken action it believes will  
30 resolve the appeal.

<sup>26</sup> Chelan County Code 14.14.130(4) also permits adoption of an amendment to the CP outside of the yearly  
cycle in response to a board appeal.

<sup>27</sup> March 2009 FDO, at 35-36.

<sup>28</sup> March 2009 FDO, at 36.

1 enactments were in effect and had amended the County's CP. Thus,  
2 although the County Planning Staff may have prepared a report which  
3 encompassed the proposed CPAs in the entirety, the BOCC was unable to fully  
4 consider the impacts of all the CPAs if it had yet to hear public testimony and  
5 comment of each of the proposed CPAs – with this public participation  
6 element of GMA planning being vital to the final decision. As noted above,  
7 **the County is not precluded from holding multiple public hearings  
but it may not amend its comprehensive plan before the conclusion  
of all public hearings thereby assuring the BOCC has all of the  
information needed to make a concurrent, reasoned, informed  
decision as to the cumulative effects of the various proposals.**

8 Wenatchee contends Chelan County was only capable of curing this violation with  
9 rescission of the offending CPAs because it could not perform a concurrent review.  
10 However, as the Board noted *supra*, the GMA permits amendments outside of the annual  
11 cycle in limited situations and this would necessarily grant exception to the concurrent  
12 review. In addition, as noted by the Board, the previous error was based on the fact the  
13 BOCC acted prior to receiving all of the information, specifically public comment. At the  
14 time of the re-adoption, all public hearings had been held on the 2007 CPAs – both the  
15 challenged CPAs and other adopted CPAs. The GMA desires concurrent review but the goal  
16 of this review is to ascertain the cumulative effects. The cumulative effects analysis for  
17 Comprehensive Plan Amendments is an interrelated requirement of both the GMA and  
18 SEPA.<sup>29</sup> With the review conducted by the County during these compliance proceedings,  
19 the BOCC had all of the information made available during the public hearing process to  
20 make their decision. This, in conjunction with the Supplemental Staff Report which sets  
21 forth analysis on a variety of impacts arising from the 2007 CPAs and the findings and  
22 conclusions set forth in the Resolutions themselves demonstrates a satisfactory cumulative  
23 analysis.

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25 <sup>29</sup> WAC 365-195-610; WAC 365-195-540; WAC 197-11-060; WAC 197-11-792.



1       • **Public Participation**

2       Wenatchee briefly states Chelan County's BOCC held a single closed record hearing on  
3       the re-adopted Resolutions. Because of this, Wenatchee contends the public was not  
4       allowed to comment or provide input and the BOCC were unable to consider public  
5       comment in relation to the supplemental findings.<sup>30</sup> In response, Chelan County contends  
6       an open record hearing would have undercut the County's ability to perform a cumulative  
      impacts analysis based upon the original adoption.<sup>31</sup>

7       The Board has reiterated throughout the years the importance of public participation  
8       in the GMA process, equating it to the GMA's "Heart and Soul."<sup>32</sup> Furthermore, every effort  
9       should be made to incorporate public involvement efforts into the GMA-related SEPA  
10      process that must be conducted for Comprehensive Plan Amendments.<sup>33</sup> Compliance  
11      proceedings do not eliminate public participation; it is just as important when a jurisdiction  
12      is responding to an order of the Board as it is during the initial adoption of an ordinance or  
13      resolution. However, the Board notes the language of .130(2)(b) in that an amendment to  
14      a CP in response to an appeal before the Board may occur outside of the annual  
15      amendment limitation "after appropriate public participation" is afforded.<sup>34</sup> As with  
16      exemptions to the annual amendment process, this section allows for exemptions from the  
17      public participation process – seeking only "appropriate" participation. Given that it was  
18      the cumulative analysis of these amendments with others adopted during the amendment  
19      cycle which was a basis for the Board's FDO, restricting participation is appropriate in order  
20      to achieve this limited purpose.

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23      <sup>30</sup> Wenatchee Compliance Brief, at 3.

24      <sup>31</sup> County Compliance Brief, at 4.

25      <sup>32</sup> *Citizens for Good Governance, et al v. Walla Walla County*, Case No. 05-1-0013, FDO (June 15, 2006).

26      <sup>33</sup> WAC 365-195-600(2)(a)(xii); WAC 365-195-610.

<sup>34</sup> RCW 36.70A.130(2)(b).

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John Roskelley, Board Member

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Raymond L. Paoella, Board Member

**Pursuant to RCW 36.70A.300 this is a final order of the Board.**

**Reconsideration:**

**Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.**

**Judicial Review:**

**Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.**

**Enforcement:**

**The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.**

**Service:**

**This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).**